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## **Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation**

### **Written Statement of David N. Levine Principal, Groom Law Group, Chartered**

Thank you for the opportunity to appear before you to testify on the issue of Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation. My testimony is intended to assist the ERISA Advisory Council by providing insight into potential legal concerns that can serve as obstacles to lifetime plan participation from two legal-focused perspectives: plan sponsors and service providers. There are multiple methods of addressing these concerns that I am happy to address in my oral testimony.

#### **A. Plan Sponsors**

Many plan sponsors are eager to help their employees retain assets in their retirement plans. While there are multiple reasons for this interest – from the desire to help participants plan for their retirement, to working to maximize cost efficiencies, to being sure that their employees will actually be able to retire at a certain date rather than “retiring in place” for fear of retirement income inadequacy – there are barriers plan sponsors current face. Examples of these barriers include the following:

- **Recommendations Under the Final Fiduciary Regulation.** Because of the complexity of the final conflict of interest rule and notwithstanding the special carve out from fiduciary status for company employees providing investment advice incidental and without compensation beyond their regular corporate roles, there is significant concern that a recommendation to roll funds into a plan could indirectly benefit an employer (for example, via potentially reduced fees due to a larger plan asset base), thus leading to exposure for plan sponsors if investigated by the Department.
- **Private Litigation.** A potentially even greater concern of plan sponsors is that taking efforts to increase rollovers, if they are fiduciary acts and/or increase the cost of plan operations, will make them and their plans bigger targets of fiduciary litigation. Plan sponsors are extremely aware of the significant spike in private litigation actions brought in the past twelve-to-eighteen months and many will now pause before taking any step that is out of the basic 401(k) plan structure advocated in many of the pending private lawsuits.

#### **B. Service Providers**

Many service provider are also eager to help participants retain assets in their retirement plans and to assist plan sponsors in achieving this same goal. However, service providers face multiple concerns of their own:

- **The Final Fiduciary Regulation.** Service providers, especially many recordkeepers and third party administrators, face significant compliance challenges under the final

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fiduciary regulation. Many of these service providers have not previously functioned as plan fiduciaries and many may be reluctant to take on this role. The Department placed significant focus on service provider rollover “capture” activities in the final fiduciary regulation and, given that rollovers into a plan could appear to fall into this same guidance framework, to assume any role beyond a ministerial one regarding rollovers into a plan is an activity many service providers may be reluctant to assume under the existing regulatory framework. Further, given the complexity and depth of many of the Department’s service provider investigations, assuming additional responsibilities that could be another item on a very large investigatory checklist may be of limited interest to some service providers.

- **Resource Pressures.** Although the Department has clearly stated that cost is not a be-all, end-all factor, recordkeepers and other service providers have limited ability to charge for additional services – such as rollover-in advice – at this time. Given this squeeze on profitability (along with the significant compliance costs of the final fiduciary regulation), recordkeepers may be hesitant to take on more responsibilities. In fact, the trend in many service provider agreements is that fewer activities are treated as “core” activities that are covered by a contract price. Instead, in some cases, an increasing number of services provided by services providers are now subject to additional fees.
- **Private Litigation.** Private sector litigation has been an increasing challenge for service providers. Given this increase, service providers may be reluctant to take on additional rollover-related roles that could be added as an additional cause of action in private ERISA litigation.

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Thank you again for the opportunity to appear before the ERISA Advisory Council.